

Staff Summary of Reading Materials for JPP Members in Preparation for the December 11th Public Meeting

A. Materials Relevant to Prohibitions of Retaliation and the UCMJ

- 1. DoD's "Report on Prohibiting Retaliation Against an Alleged Victim or Other Member of the Armed Forces Who Reports A Criminal Offense," dated June 2014 (9 pages)**

This article was previously provided for the April 10, 2015 public meeting.

As required by the FY14 NDAA, section 1709(c), this report contains DoD's analysis and response to Congress recommending that a separate punitive article should not be enacted to prohibit retaliation. DoD concluded that retaliation is best addressed through the enhanced protections under 10 U.S.C. section 1034, the Military Whistleblower Protection Act, Service regulations, and other UCMJ provisions that address the underlying misconduct.

- 2. DoD SAPRO Retaliation Overview, dated April 10, 2015 (2 pages)**

This information was previously provided for the April 10, 2015 public meeting.

Dr. Nate Galbreath, DoD SAPRO, provided this information paper to the JPP Panel members as an introductory overview of retaliation. In the document, DoD SAPRO defined "retaliation" as an umbrella term that includes various types of social and professional retaliation, listed the legislative and regulatory chronology, as well as the SecDef Initiatives. The overview also noted that, "DoD is considering recommending a legislative proposal to OMB that the UCMJ be amended by adding a punitive article on retaliation."

- 3. Chart: Summary of Service Regulatory Provisions Defining Retaliation (5 pages)**

This information has been updated from a previous version provided for the April 10, 2015 public meeting.

This chart, prepared by the JPP staff, provides the FY14 NDAA Congressional requirements to update regulations to further address retaliation and summarizes the Services' definitions of ostracism and maltreatment within their punitive regulations. The chart also includes information about the Services.

B. Materials Relevant to Military Whistleblower Protection Act (MWPA) and Legislative Proposals

- 4. Chart: Military Whistleblower Protection Act (MWPA) compared to Federal Civilian DoD Whistleblower Protections Pursuant to the No FEAR Act (8 pages)**

This chart, prepared by the JPP staff, compares the Title 10 MWPA to the Title 5 DoD Civilian whistleblower protection statute and the policies to accompany those laws. The chart provides a quick reference on key aspects of the MWPA and a comparison to protections and procedures afforded to DoD civilians.

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Allegations from Service members and DoD civilians both must meet four elements. The MWPA's fourth element—the requirement to show a causal connection between the protected communication and the adverse personnel action—differs from the DoD civilian requirement to show that knowledge of the protected disclosure was a contributing factor in the decision to take the personnel action. Under both statutes, the filer's burden of proof is "preponderance of evidence;" however, for DoD civilians, if the agency shows by clear and convincing evidence that the personnel action would have happened anyway, the Board will not take action. The Legal Justice for Servicemembers Act proposes to change the burden of proof in the MWPA for military personnel to a "clear and convincing" standard.

5. Legal Justice for Servicemembers Act and Related Press Releases (9 pages for the press releases and summary; 18 pages for text of the Bill)

This information was previously provided for the May 2015 public meeting.

Press release summaries and the text of the bill introduced by Senators Boxer, Wyden, Merkey and Speier proposing changes to the burden of proof in the MWPA to the same clear and convincing standard afforded to civilians. This proposal was not included in the FY16 NDAA.

6. Major William E. Brown, *Whistleblower Protection for Military Members*, 2008 Army Law. 58 (Dec. 2008). (10 pages)

This article does not specifically address the MWPA in the context of sexual assault, but the author provides a brief history of the MWPA and describes the general protections, prohibitions, as well as the highlights that JAGs should know to be able to assist their clients.

7. Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 Wm. & Mary Pol'y Rev. 184 (Spring 2012). (36 pages)

This article discusses the difficult federal civilian employees face with the whistleblower protection statutes and briefly addresses the MWPA. The article provides context about challenges all whistleblowers experience and the utility of the existing statutory structure.

C. Legislative Update that Pertain to Sexual Assault in the Military with FY16 NDAA

8. Legislative Update for Retaliation in the Military (2 pages)

A 2-page summary of proposed FY16 legislation was previously provided for the April 10, 2015 public meeting.

The President signed the FY16 NDAA on November 25, 2015. This chart summarizes FY16 NDAA provisions that are relevant to issues of retaliation against military victims who report crimes.

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D. DoD and Services' Responses to the JPP's Requests for Information

9. Responses to RFI Set #5, Questions 90-102 (Dec. 4, 2015) (27 pages + 119 pages of enclosures)

Question 90 responses provide an update on the military's progress regarding RSP recommendations, some of which are topics that the JPP was tasked to continue to monitor. Question 91 (where the response remains pending) requested an update on DoD responses to JPP recommendations in the JPP's February 2015 report. Responses to Questions 92 – 102 provide information in response to questions and observations raised by the JPP during deliberations on retaliation.